



Billing Code: 8025-01

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 125

RIN: 3245-AG71

Credit for Lower Tier Small Business Subcontracting

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is proposing to amend its regulations to implement Section 1614 of the National Defense Authorization Act for Fiscal Year 2014. The proposed amendments authorized by this statute would allow an other than small prime contractor that has an individual subcontracting plan for a contract to receive credit towards its small business subcontracting goals for subcontract awards made to small business concerns at any tier. The prime contractor shall incorporate the lower tier subcontracting performance into its subcontracting plan goals. Currently, other than small business prime contractors establish small business subcontracting goals at the first tier level, and receive credit toward their subcontracting plan goal performance at the first tier level. The rule also proposes to implement the statutory requirements related to the subcontracting plans of all subcontractors that are required to maintain such plans, including the requirement to monitor subcontractors' performance and compliance towards reaching the goals set out in those plans as well as their compliance with subcontracting reporting requirements. SBA is also proposing to

clarify that the size standard for a particular subcontract must appear in the solicitation for the subcontract.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AG71, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- For mail, paper, disk, or CD-ROM submissions: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8th Floor, Washington, DC 20416.
- Hand Delivery/Courier: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8th Floor, Washington, DC 20416, or send an email to brenda.fernandez@sba.gov.

Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 207-7337; brenda.fernandez@sba.gov.

SUPPLEMENTARY INFORMATION:

The proposed rule implements Section 1614 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, December 26, 2013 (hereinafter NDAA 2014). Section 1614 amended section 8(d)(6)(D) of the Small Business Act, 15 U.S.C. § 637(d)(6)(d), to provide that where a prime contractor has a subcontracting plan for a specific prime contract with an executive agency, as required by Section 8(d) of the Small Business Act, the prime contractor will receive credit towards its subcontracting plan goals for awards made to small business concerns at any tier under the contract. When a prime contractor awards a subcontract to a firm it is generally considered a first tier subcontract. That subcontractor may award a subcontract, which would be considered a second tier subcontract, and so on. Currently, a prime contractor generally receives credit towards its small business subcontracting plan goals for awards made at the first tier level.

Other than small business prime contractors report on their small business subcontracting activity in various ways. Some firms have individual subcontracting plans for each and every Federal prime contract that meets certain threshold requirements. Other firms have commercial plans, which is a plan that covers a firm's entire fiscal year and the firm's entire commercial production sold by either the entire company or a portion thereof (e.g., division, plant, or product line). See Federal Acquisition Regulation (FAR) § 19.701. Some firms that do business with the Department of

Defense have comprehensive subcontracting plans, where the firms' negotiate goals and report on a plant, division or company-wide basis, instead on each individual Federal contract. See Defense Federal Acquisition Regulation § 219.702. Section 1614 further provides that lower tier reporting credit shall not apply where a subcontracting plan applies to more than one contract or to one contract with more than one executive agency. Section 1614 applies only when determining whether or not a prime contractor has met its individual subcontracting plan goals. Thus, Section 1614 does not apply where the prime contractor has a commercial plan or comprehensive subcontracting plan. Section 1614 does not alter the requirement that lower tier subcontractors have subcontracting plans when the subcontracting threshold amounts are met. Section 1614 must be implemented so that subcontracting dollars are only reported once for the same award to avoid double and triple counting the dollars, notwithstanding the fact that a small business subcontract may be reported under more than one subcontracting plan. Section 1614 further provides that where a prime contractor or subcontractor is required to have an individual subcontracting plan, the prime contractor or the subcontractor will review and approve subcontracting plans submitted by their subcontractors, monitor their subcontractors' compliance with the subcontracting plans, ensure that reports are submitted by their subcontractors, acknowledge receipt of subcontractors' reports, monitor subcontractor performance, and discuss subcontractor performance with subcontractors where necessary.

Section 1614 also requires that a subcontracting plan must contain a recitation of the types of records the prime contractor will maintain to demonstrate the procedures which have been adopted to ensure that subcontractors at all tiers comply with the

requirements and goals in their respective subcontracting plans, including the establishment of source lists to identify small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, and efforts to identify and award subcontracts to such concerns.

SBA is also proposing to clarify that the NAICS code and corresponding size standard for a particular subcontract must appear in the solicitation for the subcontract. The current regulations only reference the subcontract itself. However, the solicitation for the subcontract must contain the size standard that a firm must represent that it meets at the time of its offer for the subcontract in order to be considered a small business concern for that subcontract. In addition, SBA is proposing to allow prime contractors and subcontractors to accept electronic size and socioeconomic representations provided the solicitation and/or subcontract require the firm making the electronic representations to verify the accuracy of the representations.

Compliance with Executive Orders 12866, 13563, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).
Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis:

1. Is there a need for the regulatory action?

The proposed regulations implement Section 1614 of the National Defense Authorization Act for Fiscal Year 2014. Section 1614(c)(3) requires the Administrator to promulgate regulations necessary to implement the Act.

2. What are the potential benefits and costs of this regulatory action?

The benefits and costs of the proposed regulations are minimal. Other than small business prime contractors and subcontractors already establish individual subcontracting plan goals and report on their achievements if the subcontracting plan thresholds are met. Under Section 1614, a prime contractor with an individual subcontracting plan will receive credit towards its goals for small business performance at lower tiers. Thus, there will be some costs to the prime contractor to propose subcontracting plan goals that incorporate small business performance at lower tiers, and there will also be costs to the Government to evaluate whether the prime contractor's goals adequately address maximum practicable small business subcontracting opportunity at all tiers. There may also be costs to the Government as eSRS may have to be modified to allow large business prime contractors to receive small business credit at any tier towards their subcontracting plan goals. There should not be any costs imposed on small business concerns.

3. What are the alternatives to this final rule?

Many of the proposed regulations are required to implement specific statutory provisions which require promulgation of implementing regulations. There are no other alternatives that would meet the statutory requirements. Executive Order 13563

As part of its ongoing efforts to engage stakeholders in the development of its

regulations, SBA has solicited comments and suggestions from procuring agencies on how to best implement Section 1614. SBA has incorporated those comments and suggestions to the extent feasible. SBA intends to incorporate, where feasible, public input into the final rule.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Executive Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

For purposes of the Paperwork Reduction Act (PRA), SBA has determined that this proposed rule, if adopted in final form, would not impose new government-wide reporting and record keeping requirements on other than small prime contractors and subcontractors. When this rule is implemented in the FAR, there may be a requirement to amend or create an information collection. Thus, any PRA implications as part of any

proposed rulemaking implementing an SBA final rule in the FAR will be addressed in the FAR rule.

Regulatory Flexibility Act, 5 U.S.C. 601-612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines “small entity” to include “small businesses,” “small organizations,” and “small governmental jurisdictions.” This proposed rule concerns various aspects of SBA’s contracting programs. As such, the rule relates to small business concerns, but would not affect “small organizations” or “small governmental jurisdictions” because those programs generally apply only to “business concerns” as defined by SBA regulations, in other words, to small businesses organized for profit. “Small organizations” or “small governmental jurisdictions” are non-profits or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA’s regulations.

There are approximately 290,000 concerns registered as small business concerns in the System for Award Management (SAM) that could potentially be impacted by the implementation of Section 1614. However, we cannot say with any certainty how many will be impacted because we do not know how many of these concerns participate in government contracting as subcontractors. A firm is required to register in SAM in order to participate in Federal contracting as a prime contractor, but not for purposes of subcontracting. However, as discussed elsewhere in this proposed rule, there are no new

compliance or other costs imposed by the proposed rule on small business concerns. In sum, the proposed amendments would not have a disparate impact on small businesses and would increase their opportunities to participate in federal government contracting as subcontractors without imposing any additional costs. For the reasons discussed, SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small business concerns.

List of Subjects

13 CFR Part 121

Government Contracts, Government procurement, Small businesses, Size standards.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 121 and 125 as follows:

PART 121 – SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

2. Amend § 121.411 by removing the second sentence in paragraph (b) and adding two sentences in its place to read as follows:

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

* * * * *

(b) *** Prime contractors may accept a subcontractor's electronic self-certification as to size, if the solicitation for the subcontract contains a clause which

provides that the subcontractor verifies by submission of the offer that the size representations and certifications are accurate and complete. Electronic submission may include any method acceptable to the prime contractor including, but not limited to, size representations and certifications made in SAM (or any successor system). *** .

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PART 125 – GOVERNMENT CONTRACTING PROGRAMS

3. The authority citation for 13 CFR part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6), 637, 644, 657f, and 657q

4. Amend § 125.3 as follows:

- a. Revise paragraph (a)(1) introductory text;
- b. Add paragraph (a)(1)(i)(C);
- c. Revise the heading for paragraph (c);
- d. Revise the first sentence of paragraph (c)(1)(i);
- e. Revise paragraph (c)(1)(v);
- f. Remove the word “and” at the end of paragraph (c)(1)(viii);
- g. Add new paragraphs (c)(1)(x) and (c)(1)(xi).

§ 125.3 What types of subcontracting assistance are available to small businesses?

(a) * * *

(1) Subcontract – under this section the term ‘subcontract’ means a legally binding agreement between a contractor that is already under contract to another party to perform work and a third party (other than one involving an employer-employee relationship), hereinafter referred to as the subcontractor, for the subcontractor to perform a part or all of the work that the contractor has undertaken.

(i) * * *

(C) Where the subcontracting goals pertain only to an individual subcontracting plan, the contractor may receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns. Prime contractors must incorporate the subcontracting plan goals of their lower tier subcontractors in their individual subcontracting plans. Lower tier subcontractors must have their own individual subcontracting plans if the subcontract is at or above the subcontracting plan threshold, and are required to meet their subcontracting plan goals. The actual subcontracting dollars are only reported once for the same award to avoid double counting the dollars, notwithstanding the fact that a small business subcontract may be reported under more than one subcontracting plan.

* * * * *

(c) *Additional responsibilities of other than small contractors.* (1) * * *

(i) Submitting and negotiating before award an acceptable subcontracting plan that reflects maximum practicable opportunities for small businesses in the performance of the contract as subcontractors or suppliers at all tiers of performance.* * *

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(v) The contractor must assign to the solicitation and the resulting subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see § 121.410 of this chapter). The prime contractor may rely on a subcontractor's electronic representations and certifications, if the solicitation for the

subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are current, accurate and complete as of the date of the offer for the subcontract.

Electronic submission may include any method acceptable to the prime contractor including, but not limited to, size or socioeconomic representations and certifications made in SAM (or any successor system). A prime contractor or subcontractor may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract;

* * * * *

(x) The prime contractor must require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,500,000 in the case of a subcontract for the construction of any public facility, or in excess of \$650,000 in the case of all other subcontracts, and which offer further subcontracting possibilities, to adopt a subcontracting plan of its own consistent with this section, and must ensure at a minimum that all subcontractors required to maintain subcontracting plans pursuant to this paragraph, will review and approve subcontracting plans submitted by their subcontractors; monitor subcontractor compliance with their approved subcontracting plans; ensure that subcontracting reports are submitted by their subcontractors when required; acknowledge receipt of their subcontractors' reports; compare the performance of their subcontractors to subcontracting plans and goals; and discuss performance with subcontractors when necessary to ensure their subcontractors make a good faith effort to comply with their subcontracting plans; and

(xi) The prime contractor must recite the types of records the prime will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the plan established in accordance with paragraph (c)(1)(x) of this section, including the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, and the efforts to identify and award subcontracts to such small business concerns.

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Dated: September 28, 2015.

Maria Contreras-Sweet,
Administrator.

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